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IN THE

SUPREME COURT OF THE UNITED STATES

83-6061 (4)

JOSE AND FRANCISCO GARCIA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

THEODORE J. SAKOWITZ
FEDERAL PUBLIC DEFENDER

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38 pp

IN THE

SUPREME COURT OF THE UNITED STATES

JOSE AND FRANCISCO GARCIA
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17 day of January, 1984, in accordance with Rule 33 of the Rules of the Supreme Court of the United States, copies of the

1) Motion for Leave to Proceed in Forma Pauperis,
2) Petition for Writ of Certiorari, and
3) Certificate of Service,

were served upon the United States Attorney for the Southern District of Florida, 155 South Miami Ave., Miami, Florida 33130, by delivery, and upon the Solicitor General, Department of Justice, Washington, D.C. 20530, by mail.

THEODORE J. SAKOWITZ
FEDERAL PUBLIC DEFENDER

BY: _____
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NUMBER _____

JOSE AND FRANCISCO GARCIA,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW the Petitioners, Jose and Francisco Garcia by his undersigned counsel, pursuant to Rule 46.1 of the Supreme Court Rules, and asks leave to file the accompanying Petition for a Writ of Certiorari in the Supreme Court of the United States without payment of costs, and to proceed in forma pauperis.

Petitioners have previously been adjudicated indigent and the Federal Public Defender has been appointed to represent them pursuant to Title 18, U.S.C., §3006A; therefore the Petitioners rely upon Title 18, U.S.C., §3006(d)(6) and have not attached the affidavit which would otherwise be required by Title 28 U.S.C., §1915(a).

THEODORE J. SAKOWITZ
FEDERAL PUBLIC DEFENDER

BY: _____
Charles G. White
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PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Jose and Francisco Garcia respectfully petition the Supreme Court of the United States for a Writ of Certiorari to review that portion of the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit rendered and entered in Case Number 82-5048 of that Court on November 7, 1983, which affirms the judgment of the United States District Court for the Southern District of Florida.

QUESTION PRESENTED FOR REVIEW

WHETHER A PROSECUTION UNDER 18 U.S.C. §2114 REQUIRES A POSTAL NEXUS IN ORDER FOR A CONVICTION TO BE SUSTAINED.

LIST OF PARTIES TO THE PROCEEDING

The parties to this proceeding are the United States of America and Jose and Francisco Garcia

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OPINION BELOW

A copy of the opinion of the Court of Appeals, for the Eleventh Circuit rendered November 7, 1983 and entered on the same date affirming the petitioners' conviction has been published under the citation 718 F.2d 1528. A copy of the opinion is attached.

BASIS OF JURISDICTION

Jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

STATEMENT OF THE CASE

Jose and Francisco Garcia, the petitioners, along with Ernesto Dominguez, who is not a party to these proceedings, were charged in a five count indictment with conspiracy to steal money belonging to the United States valued in excess of $100, in violation of 18 U.S.C. §371 (Count I), stealing money belonging to the United States valued in excess of $100, in violation of 18 U.S.C. §641 (Count II), robbery of money belonging to the United States with an assault involving the use of a dangerous weapon, in violation of 18 U.S.C. §2114 (Count III), possession of counterfeit notes, in violation of 18 U.S.C. §472 (Count IV), forcibly assaulting federal officers, in violation of 18 U.S.C. §111 (Count V).

On October 6, 1981 petitioners proceeded to a jury trial. Petitioners' motions for judgment of acquittal at the close of the government's case and at the close of all the evidence were denied. On October 14, 1981 the jury returned a verdict of

guilty on all counts except Count V against Francisco Garcia.

On November 17, 1981 Jose Garcia was sentenced to a term of incarceration of twenty-five (25) years on Count III, five years on Count II consecutive with Count III, five years on both Counts I and III to run concurrent with the term imposed on Count II, and the ten (10) years on Count V to run consecutive with that term imposed on Count III and concurrent to the term in Count II. According to counsel's computation, the total is thirty five (35) years and not forty (40) asserted in the Judgment and Commitment Order.

On that same date Francisco Garcia was sentenced to a term of incarceration of twenty-five (25) years on Count III and five years each for Counts I, II, and IV to run concurrently with each other and consecutively to that term of incarceration imposed in Count III for a total of thirty (30) years.

Petitioners filed a timely appeal which raised the issues that it was error for the trial judge to a) deny petitioners' motions for judgment of acquittal on Count III (18 U.S.C. §2114), b) admit the counterfeit bills, c) impose consecutive sentences for convictions under Counts II, III and V, and d) deny petitioners' motions for judgment of acquittal based on the insufficiency of the evidence. Oral argument was heard before a panel of the Eleventh Circuit Court of Appeals comprised of Judges Fay and Kravitch, with Atkins sitting by designation. The conviction was affirmed in an opinion published at 718 F.2d 1528.

It is the contention of the petitioners that the first issue listed above concerning the failure of the trial judge to enter a judgment of acquittal as to Count III should be considered by the Supreme Court. The Eleventh Circuit held that one could be convicted of a violation of 18 U.S.C. §2114 without there being a postal nexus between the money taken or its custodian. In arriving at this conclusion the dissenting opinion of Judge Mansfield from the Second Circuit case of United States v. Reid, 517 F.2d 953 (2nd Cir. 1975), was specifically adopted by the Eleventh Circuit. The Reid Court held that a postal nexus was required to convict of a violation of 18 U.S.C. §2114. Other cases have held the same way. See United States v. Rivera, 521 F.2d 125 (2nd Cir. 1975), United States v. Rivera, 513 F.2d 519 (2nd Cir. 1975) cert. denied, 423 U.S. 948 (1975). United States v. Fernandez, 497 F.2d 730 (9th Cir. 1974). The Eleventh Circuit has clearly created a conflict between the circuits which must be resolved by the Supreme Court because of its great importance to the prosecution and defense of cases of this type. The Eleventh Circuit has authorized the use of a statute containing a mandatory twenty-five year prison term against all precedent, and the position of the Solicitor General taken in United States v. Hanahan, 442 F.2d 649 (7th Cir. 1971), vac. & rem'd, 414 U.S. 807, 94 S. Ct. 169, 28 L. Ed. 2d 43 (1973).

STATEMENT OF FACTS

On July 22, 1981 Secret Service Agent David Holmes, accompanied by a confidential informant named Jorge Castro, met with petitioners along with co-defendant Ernesto Domingo at Douglas Park in

Miami, Florida, purportedly to buy a quantity of counterfeit money. Castro introduced Holmes to Dominguez and Francisco Garcia as the purchasers, and Dominguez asked the agent if he had the money. The agent in turn asked Dominguez if he had the counterfeit money and Dominguez told the agent that the counterfeit money was in the trunk of a white Trans-Am that the petitioners had arrived in. After "flashing" Dominguez the money he had with him, the agent said he wanted to consumate the deal at Douglas Park, but Dominguez stated that the place was "heated up" and asked that the exchange take place at another location. Dominguez then suggested Bryant Park some five blocks away.

Once at Bryant Park, Dominguez wanted to see the money again, but was refused. The agent told Dominguez that he didn't think they had any money. Dominguez responded that they did, and Francisco Garcia showed agent Holmes a "sample" $50.00 bill. Holmes agent again insisted on seeing the counterfeit money. He then turned and walked to his car.

Agent Holmes testified that suddenly Jose Garcia jumped out of the Trans-Am, pointed a semi-automatic pistol at him, and demanded his money.

Secondu after, back-up agents arrived on the scene and Jose Garcia dropped the weapon on the ground. Holmes also indicated that his car door was open and the black leather pouch was recovered at the scene. The key to the Trans-Am, which was locked, and the $50.00 bill, were recovered from Francisco Garcia, who was hit by a surveillance agent's car.

Surveillance agents responding to the scene also testified about their observations. Agent Greg Null testified that he and his partner, Thomas Grant, were a block from the meeting when they saw Agent Holmes raise his hands in a pre-arranged danger signal.

While racing to the scene Null saw Jose Garcia with a gun pointed at Agent Holmes who had his back to Jose Garcia. Holmes testified that he backed away facing Jose Garcia, as did another government witness Alex Suarez.

Agent Thomas Grant also testified that he saw Jose Garcia with a gun, which Grant recovered at the scene and handed over to Special Agent Kevin Foley. Grant also testified that he found the keys to the Trans-Am, as well as a counterfeit $50.00 bill on Francisco Garcia. This is in direct contrast to Agent Holmes' testimony, who testified that the Trans-Am was locked. Agent Grant testified that the car windows were down. Grant drove the Trans-Am to the Secret Service office in order to search it. Once at the office, the car and its trunk was searched. No counterfeit money was found. Agent Grant had been led to believe that a great deal of counterfeit money could be found by the confidential informant.

Agent Paul Hachenberry testified that after seeing the distress signal, he observed Francisco Garcia run toward the government vehicle and then run away from the scene of the arrest looking over his shoulder, with the black pouch in his hand. While the car was moving, Francisco was struck and fell to the ground, dropping the pouch.

Agent Kevin Foley testified that he saw Francisco Garcia run towards the Grand Prix, then, and run away from it. Foley also testified that the gun recovered was legally registered to Francisco Garcia, and that the confidential informant had told them that $80,000.00 in counterfeit money was available.

Both petitioners testified on their own behalf. Jose Garcia testified that two days prior to this incident he and his brother were approached by the confidential informant, Jorge Castro, a known quaalude addict, about "taking" a man he knew for his money. The scheme proposed by Castro was to have appellants show this man counterfeit $50 and $100.00 bills which Castro provided appellants. At first petitioners resisted the idea, but after Dominguez asked them to help, they agreed. Jose Garcia understood that he, his brother, and Dominguez were to hold the man while the confidential informant took his money.

On July 22, 1981 petitioners drove to Douglas Park and Dominguez met the agent while the confidential informant remained in the car. Apparently, someone didn't like the arrangements so they moved to Bryant Park, five blocks away. When they arrived at Bryant Park, Dominguez and the agent immediately began arguing about who would see whose money first. Jose Garcia hadn't seen any money at that time.

During the argument, Holmes raised his hands and then grabbed his pistol on his right leg as the other agents swarmed over him and the suspects. Jose Garcia was struck by Agent Holmes with a pistol

and then his arm was twisted behind his back. Jose Garcia strenuously denied ever having a gun at the scene.

Francisco Garcia testified that he and his brother were approached by Jorge Castro some two days prior to the incident about 'taking' a man for his money. He was given a counterfeit bill by Castro which he accepted. On July 22, 1981 Castro Dominguez and the petitioners met at Douglas Park where Dominguez and Castro made arrangements to meet at another location. While at the meeting in Bryant Park, Dominguez asked him for the bill Castro had given him and Francisco handed it to him. He in turn, gave it to the agent who then returned it to Francisco. At that point, the agents pulled into the parking lot scaring Francisco. When he turned to the side, he was struck by a moving vehicle. Francisco vehemently denied ever touching the leather pouch with the money in it. Additionally, he testified that his brother never had a gun.

Several eyewitnesses were called to testify by both sides. Defense witness Marta Pedrosa testified that on July 22, 1981 she and her father were in front of their house when two cars, speeding by her, came down the block, and then came to a screeching halt. The agents got out of their car with guns drawn, and wrestled with the petitioners. She also observed the agents kicking Jose Garcia. Ms. Pedrosa further testified that Francisco Garcia had been struck by a car, but that in contrast to the testimony of the agents, she observed nothing in his hand, such as a leather pouch. The agents

seemed to be interested in finding the key to the Trans-Am, and eventually found it in Francisco Garcia's pocket. The agent then went into the car and came out with a pistol from which he removed the clip. Ms. Pedrosa thought it had been removed from the glove compartment.

The government then called Edna Benson to testify to her observations on July 22, 1981. She testified to the circumstances surrounding her coming to court. From her testimony, it appeared that she arrived too late to make any observations relevant to the inquiry except that one of the defendants appeared to resist arrest.

After lengthy hearings on the matter, the defense was allowed to re-open its case to call Rafael Pedrosa, the father of Martha Pedrosa another eyewitness to the incident on July 22, 1981.

Mr. Pedrosa testified that on July 22, 1981, he saw the cars speeding into Bryant Park and walked over to see what was going on. From a distance of twenty feet, he observed three young men handcuffed, and one very happy agent who had found a key to an automobile which he used to open the car. The agent prior to going into the car was unarmed, but when he stepped out of the car he had a pistol from which he removed the clip, and then placed it in his belt. Mr. Pedrosa also never saw a black leather pouch similar to that entered into evidence by the government.

The government was given an extraordinary opportunity to reopen their case for the third time and called Alex Suarez to testify to what he saw in

the park on July 22, 1981 when the petitioners were arrested. He testified that he observed the agent raise his hands, back away and say "Don't shoot!" to someone, although Suarez never saw a gun. Suddenly other agents arrived on the scene to arrest the three men present. Suarez did not observe any mistreatment by the agents. However, he observed them searching the car. Suarez saw that the agent who searched the car had a revolver in his waistband, and like witness Pedrosa, Mr. Suarez saw no weapon in his hand prior to the search.

ARGUMENT

ISSUE I

THAT A PROSECUTION UNDER 18 U.S.C. §2114 REQUIRES A POSTAL NEXUS IN ORDER FOR A CONVICTION TO BE SUSTAINED

a) That the so-called plain meaning doctrine does not prohibit review of Congressional intent.

b) That Congressional intent requires a postal nexus in prosecutions of 18 U.S.C. §2114.

Title 18 United States Code, §2114 reads in pertinent part:

> Whoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person

> having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty five years.

That a charge under 18 U.S.C. §2114 requires some "postal nexus" before a conviction is warranted has been based upon careful consideration of the intent of Congress in enacting the 1935 amendment to §2114, Act of August 26, 1935, ch. 694, 49 Stat. 867, by both the Second and Ninth Circuits and the concession of the Solicitor General in a Seventh Circuit case. United States v. Rivera, 521 F.2d 125 (2nd Cir. 1975). United States v. Reid, 517 F.2d 953 (2nd Cir. 1975). United States v. Rivera, 513 F.2d 519 (2nd Cir. 1975) cert. denied 423 U.S. 948 (1975). United States v. Fernandez, 497 F.2d 730 (9th Cir. 1974) cert. denied 420 U.S. 990 (1975), rehearing denied 421 U.S. 1017 (1975). United States v. Hanahan, 442 F.2d 649 (7th Cir. 1971), vac & remanded, 414 U.S. 807 (1973).

The Eleventh Circuit in holding that prosecution under 18 U.S.C. §2114 did not require a postal nexus specifically adopted the dissent of Judge Mansfield in the Reid case. United States v. Garcia, 718 F.2d 1528, 1533 (11th Cir. 1983). Judge Mansfield felt that because, in his opinion, the wording of the statute appeared clear and unambiguous there was no need to look behind the statute to better ascertain its meaning. Judge Mansfield felt that even if the intent of Congress was reviewed, there is nothing clearly indicating that Congress intended a "postal nexus" be applied.

Lastly, Judge Mansfield held that the opinion of the Solicitor General was not controlling because he disagreed with his opinion on a matter of law.[1]

Now Petitioners will present rebuttal to these contentions.

a. That the so-called plain meaning doctrine does not prohibit review of Congressional intent.

Judge Mansfield and the panel which heard oral argument in this case were particularly interested in the propriety of looking behind the statute to determine legislative intent Citing Malat v. Riddell, 383 U.S. 569 (1966), Commissioner of Internal Revenue v. Brown, 380 U.S. 563, 571-72 (1965). United States v. Oregon, 366 U.S. 643, 648 (1961), Schwegmann Bros. v. Calvert Corp., 341 U.S. 384, 395-96 (1951), Browder v. United States, 312 U.S. 335, 338 (1941), and United States v. American Trucking Assn's Inc., 310 U.S. 534, 543 (1940), language was extracted which appeared to support the "plain meaning" of the words over any other factor when considering the scope of the statute and the definitions to be attached to its language. Yet in all those cases the issue before the Court was resolved after a careful consideration of the Congressional intention that the plain meaning, and not some other meaning would be applied. The Court has applied this general principle many times.

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1. Petitioners raise, but leave to another time, the propriety of the Government having sought an indictment on this charge under the facts of this case in the face of the Solicitor General's concession and the overwhelming precedent.

In attempting to define "sale" in Commissioner v. Brown, supra the Court, after assigning the term its "plain meaning", went on to rely on legislative intent to determine the scope of a term.

> Unquestionably the courts, in interpreting a statute, have some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of the meaning would lead to absurd results... or would thwart the obvious purpose of the statute.
>
> 380 U.S. at 571

The Supreme Court spoke more clearly in United States v. American Trucking Assn's Inc. when it said:

> In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation.
>
> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, However, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law"

> which forbids its use, however clear the words may appear on "superficial examination." The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion. Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts. A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, "excepting as a different purpose is plainly shown."
>
> 310 U.S. at 542-44

It is interesting that Judge Mansfield quoted out of context a small section of the foregoing holding, for the proposition that the "plain meaning" always prevails despite legislative intent to the contrary. This irony was noticed by the majority in Reid, 517 F.2d at 957 n. 3a.

In TVA v. Hill, 437 U.S. 153 (1977), the Court was considering whether to terminate a $100 million federally funded dam project in order to enforce the mandatory language of the Endangered Species Act of 1973. In a classic analysis of statutory construction the Court considered the "plain meaning" of the Endangered Species Act, but then consulted the legislative history to see if Congress really meant what it said. Justice Powell,

in his dissent evoked the doctrine underlying the case of Church of the Holy Trinity v. United States, 143 U.S. 457 (1892), and the lack of clear Congressional intent for the very expensive and destructive result the majority conceded would derive from their holding. Justice Rehnquist wrote in his dissent that principles of equity should be used to obtain the best result. The attitudes of these dissenters is appropriate to the instant case because it is a criminal matter, not a civil proceeding, where leniency toward defendants is appropriate.

A federal criminal statute should be construed narrowly in order to encompass only that conduct that Congress so intended to criminalize. Dunn v. United States, 442 U.S. 100, 112 (1979); United States v. Dudley, 581 F.2d 1193, 1197 (5th Cir. 1978). Although a criminal statute must be strictly construed, it must not be construed so stricly as to defeat the clear intention of the legislature. Barrett v. United States, 423 U.S. 212, 218, (1976); Huddleston v. United States, 415 U.S. 814, 831, (1974); United States v. Cook, 384 U.S. 257, 262-63, (1966). "The principle of strict construction 'does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature.'" United States v. Levy, 579 F.2d 1332, 1337 (5th Cir. 1980), cert. denied, 440 U.S. 920, (1979), quoting United States v. Bramblett, 348 U.S. 503, 510, (1955).

A basic canon of statutory construction is that words should be interpreted as taking their

ordinary and plain meaning. E.g., Perrin v. United States, 444 U.S. 37, 42, (1980). Although in interpretation of statutory language reference should first be made to the plain and literal meaning of the words, the overriding duty of a court is to give effect to the intent of the legislature. Flora v. United States, 357 U.S. 63, 65, (1958); United States v. Second National Bank of North Miami, 502 F.2d 535, 539 (5th Cir. 1974), cert. denied, 421 U.S. 912, (1975). A statute should ordinarily be interpreted according to its plain language, unless a clear contrary legislative intention is shown. United States v. Apfelbaum, 445 U.S. 115, 121 (1980).

The analysis of the Eleventh Circuit in following the old Fifth Circuit language in United States v. Scrimgeour, 636 F.2d 1019 (5th Cir. Unit B 1981) to the effect that "or" means the disjunctive always, is curious in light of the fact that the holding of that case was that "or" was "and" if that was the intent of the legislature.

Therefore, inquiry should be made into the intent of Congress when enacting the 1935 amendment to 18 U.S.C. §2114.

b) That Congressional intent requires a postal nexus in prosecutions of 18 U.S.C. §2114.

By adopting Judge Mansfield's dissent the Eleventh Circuit was presumably adopting his reasoning. Part of this reasoning pertained to the effect to be given to the Solicitor General's concession. Judge Mansfield then concluded that undue reliance was placed on that opinion. 517 F.2d at 970. Yet, each court that has considered this

matter has independently evaluated the Congressional intent and concluded that the Solicitor General was justified in his concession.

The 1935 amendment to 18 U.S.C. §2114 (which at that time was found at 18 U.S.C. §320 added the terms "or of any money or other property of the United States" to the mail matter previously covered by the statute. These changes were requested by the Postmaster General, were referred to the Committee on Post Offices and Post Roads of each House. The committee reports, of which the general language introducing the reports was quoted so approvingly by Judge Mansfield, consist almost exclusively of a letter from the Postmaster General, which is reproduced.

Post Office Department,
Office of the Postmaster General,
February 20, 1935

Hon. James M. Mead,
Chairman Committee on the Post Office and Post Roads, House of Representatives.

My Dear Mr. Mead:

The receipt is acknowledged of your letter of the 16th instant, requesting a report on H.R. 5360, a bill providing for punishment for the crime of robbing or attempting to rob custodians of Government moneys or property.

Assaults upon custodians of mail matter are punishable under section 197 of the Federal Penal Code (19 U.S.C. §320), which provides a penalty of 25 years imprisonment if the custodian is wounded or his life is put in jeopardy by the use of a dangerous weapon. If the person assaulted is a custodian of Government funds (not mail) the maximum punishment that can be imposed is imprisonment for not more than 10 years and a fine of not more than $5,000; and no penalty is provided for attempts to commit such crimes. Recent years have witnessed a substantial increase in crimes of the latter type and it is believed that section 197 of the Penal Code should be amended so as to bring within its provisions the crime of robbing or attempting to rob custodians of Government moneys. Legislation to this effect was recommended in the Postmaster General's annual report for 1933 and two bills, H.R. 6546 and H.R. 7214 were introduced and referred to

the House Judiciary Committee but neither bill was reported out by the committee. The recommendation for the passage of this legislation is renewed.

Very truly yours,
James A. Farley
Postmaster General.

H.R. Rep No. 582, 74th Cong., 1st Sess. (1935)
and
S Rep. No. 1440, 74th Cong., 1st Sess. (1935)

This letter is the only input from any federal agency contained within the committee reports. It clearly carries with it the assumption that the Postmaster General would be one of the few people interested in this Act. Surely every other agency was covered by the provisions of what is now known as 18 U.S.C. §2112. In 1935 the predecessor of this statute was found in 18 U.S.C. §99. Section 99 clearly made it a federal crime to rob someone of government property. The statute had been in effect since 1909. Clearly, the amendment to the §320 was intended to apply only to postal matters. As the Reid majority noted expanding the scope of §2114 to exclude a postal nexus "was a misguided effort on any view since the robbery of any government property had long been covered by what is now 18 U.S.C. §2112, see e.g., Act of March 2, 1867, ch. 193, 14 Stat. 557, codified in Rev.Stat. 5456; 18 U.S.C.§99 (1946 ed.), and the real importance of §320 was that its assault provisions covered all postal employees whereas the only postal employees covered in the general statute concerning assaults on federal officers, 18 U.S.C. §§253 and 254, were "post-office inspectors". 517 F.2d at 951 n. 4.

On the floor of the House of Representatives there was some discussion of the bill. 79

Cong. Rec. 8205 (1935). Congressman Truax was questioning the propriety of making a mandatory twenty-five year sentence for the proposed Act and not extending the same protection to people charged with burglary of a home. Congressman Wolcott's response addressed the jurisdictional issue raised by Mr. Truax. This exchange was cited by Judge Mansfield as evidence that Congress intended a broad bill. United States v. Reid, 517 F.2d at 969. However, after being informed by Congressman Dobbins of the intended scope and purpose of the bill, Mr. Truax made the following proposal to broaden its scope which was never adopted.

> Mr. Truax: Mr. Speaker, I will say to the gentleman from Illinois that I think we ought to have some salutory laws that will protect the Government and its property from the Wall Street bandits. 79 Cong. Rec. 8205

Congressman Dobbins, as previously noted had described completely the scope of the Act in what the Ninth Circuit characterized "as illuminating as legislative history could possibly be". United States v. Fernandez, 497 F.2d at 740. Dobbins said:

> Mr. Speaker, the gentleman from Ohio objects to the 25-year penalty provided in this bill. The penalty clause is not new legislation. If this bill is not passed, the statute will still contain the mandatory 25-year penalty.
>
> The only purpose of the pending bill is to extend the protection of the present law to property of the United States in the custody of its postal officials, the same as it now extends that protection to mail matter in the custody its postal officials. It just includes property of the United States in addition to mail matter which is protected; and let me say there are many custodians of postal stations who have a great amount of money in their custody but little mail; for instance, in those substations where money orders are sold. If a bandit attacks those employees seeking that money, there is no way to prosecute the bandit under the present law, but if he is merely after a postal card or a letter he can be prosecuted.
>
> I think this makes a salutary change in the law. It is advocated by the Post Office Department and it seems to me there ought to be no objection to it.
>
> 79 Cong. Rec. 8205

In 1948 the Federal Penal Code was recodified and in that context, the "unambiguous" words of the statute were taken out of context by the Eleventh Circuit. As the Reid majority said:

> No Congressman could have supposed that in passing an amendment to that section proposed by the committee dealing with the postal service, he was creating a new crime with respect to government property generally.
>
> 517 F.2d at 957 n.3a

CONCLUSION

For the reasons set forth above petitioners ask this Court to vacate the conviction as to Count III of the Indictment and enter a judgment of acquittal as to that Count.

Counsel for petitioners heretofore has submitted principal grounds for, and argument butrespectfully moves this Court in its discretion to permit additional argument and amended briefs to be submitted as manifest in the necessity of justice.

THEODORE J. SAKOWITZ
FEDERAL PUBLIC DEFENDER

BY: _____
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EDITOR'S NOTE

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UNITED STATES of America, Plaintiff-Appellee,

v.

Jose GARCIA and Francisco Garcia, Defendants-Appellants.

No. 82-5018.

United States Court of Appeals, Eleventh Circuit.

Nov. 7, 1983.

Defendants were convicted in the United States District Court for the Southern District of Florida, Eugene P. Spellman, J., of multiple counts charging stealing and robbing money of the United States by use of a pistol, conspiracy to steal, possession of counterfeit money and assaulting a secret service agent with a loaded pistol, and they appealed. The Court of Appeals, Atkins, District Judge, sitting by designation, held that: (1) statute defining offense of assaulting or robbing any person having lawful charge, control or custody of any mail matter, money or other property of United States does not require a "postal nexus" as an essential element; (2) counterfeit notes were properly admitted into evidence; (3) evidence was sufficient to support convictions; and (4) imposition of consecutive sentences did not violate defendants' rights against double jeopardy.

Affirmed.

1. Post Office ⇐27

Statute providing, inter alia, that whoever assaults any person having lawful charge, control or custody of any mail matter or of any money or other property of the United States shall be imprisoned, does not require a "postal nexus" as an essential element; that is, offenses prohibited by that statute are not limited to robbery of mail matter and assault upon a person holding money or other property in custody of United States Post Office. 18 U.S.C.A. § 2114.

2. Statutes ⇐197

Use of disjunctive in a statute indicates that alternatives were intended.

3. Statutes ⇐217.4

Review of legislative history is only justified when a statute is inescapably ambiguous.

4. Criminal Law ⇐404(3)

Evidence, including testimony by government agents that counterfeit notes were discovered in possession of defendants, that notes were turned over to other agents, that notes were admitted into evidence, and that notes were counterfeit, was sufficient to support finding that counterfeit notes were those possessed by defendants at time of their arrest, thereby supporting their introduction into evidence in prosecution for, inter alia, knowingly and willfully and with intent to defraud, possessing and concealing forged and counterfeit Federal Reserve notes. Fed.Rules Evid.Rule 901(a), 28 U.S.C.A.

5. Criminal Law ⇐404(1), 736(1), 1153(6)

Admission of exhibits into evidence is predicated on showing that exhibit being offered is in substantially same condition as when crime was committed; that determination is to be made by trial judge, not jury, and may not be overturned except for a clear abuse of discretion.

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6. Criminal Law ⇐404(1)

Factors to be considered in making determination of admissibility of exhibits into evidence include nature of article, circumstances surrounding its preservation and custody, and likelihood of others tampering with it; upon considering such factors, if trial judge is satisfied that in reasonable probability article has not been changed in any important respect, he may permit its introduction in to evidence.

7. Assault and Battery ⇐92(3)
Conspiracy ⇐47(11)
Counterfeiting ⇐18
Robbery ⇐24.1(3)

Evidence, including testimony that first defendant took pouch containing real currency, with which government agent attempted to purchase counterfeit money from defendants, that second defendant pointed pistol at agent, that both defendants possessed counterfeit bills as show money, and that first defendant refused to conclude transaction at first park and deal was moved to second park, where he pulled gun on agent while second defendant removed money from agent's vehicle, supported findings that money was stolen, that second defendant brandished deadly weapon and that defendants were not entrapped, thereby supporting their convictions of stealing and robbing money of the United States by use of a pistol, conspiracy to steal, possession of counterfeit Federal Reserve notes and assaulting a secret service agent with a loaded pistol.

8. Criminal Law ⇐1218(3)

Where defendant was sentenced to 25 years as to count III, five years as to count II, consecutive to count III, five years as to count I and IV, concurrent with each other and concurrent with count II, and ten years as to count V, consecutive to count III, judgment and commitment order providing for a total of 40 years incarceration was correct on its face.

9. Criminal Law ⇐196

In determining, for double jeopardy purposes, whether crimes charged are the same offense, inquiry is not whether identical facts support charges; rather, test is whether each provision requires proof of a fact which other does not. U.S.C.A. Const. Amend. 5.

10. Criminal Law ⇐163

Imposition of consecutive sentences for assaulting, resisting or impeding certain officers or employees, embezzlement of public money, property or records, and assault of any person having lawful charge, control or custody of mail matter or of any money or property of the United States did not violate defendants' rights against double jeopardy. 18 U.S.C.A. §§ 111, 641, 2114; U.S.C.A. Const.Amend. 5.

11. Criminal Law ⇐163

Provided that court does not exceed legislative authorization by imposing multiple punishment for same offense, following single trial, constitutional guarantee against double jeopardy is not violated. U.S.C.A. Const.Amend. 5.

12. Criminal Law ⇐1210(1)

A legislature can specifically authorize cumulative punishment under two statutes which proscribe "same" conduct; accordingly, trial court may impose cumulative punishment under such statutes at single trial. U.S.C.A. Const.Amend. 5.

13. Indictment and Information ⇐191

When some, but not all, of elements of crime charged would support conviction of another offense, latter may be termed a "lesser offense."

14. Indictment and Information ⇐191

Lesser offense must not require some additional element not needed to constitute greater offense.

15. Indictment and Information ⇐191, 191(9)

Offenses of embezzlement of public money, property or records, and assault or robbery of any person having lawful charge, control or custody of any mail matter, money or other property of the United States, respectively, are not greater and lesser offenses. 18 U.S.C.A. §§ 641, 2114.

Appeal from the United States District Court for the Southern District of Florida.

Before FAY and KRAVITCH, Circuit Judges, and ATKINS *, District Judge.

ATKINS, District Judge:

Jose Garcia and Francisco Garcia were convicted of multiple counts charging (a) stealing and robbing money of the United States by use of a pistol, (b) conspiracy to steal, (c) possession of counterfeit Federal Reserve notes and (d) assaulting a Secret Service Agent with a loaded pistol. Jose was found guilty on all counts. Francisco was convicted of all but Count V relating to the assault. The Garcias raised issues dealing with a "postal nexus" as an essential element of the property stolen; Counts II, III and V having the same elements, precluding consecutive sentences; the admissibility of the counterfeit bills; and the sufficiency of the evidence. Finding no requirement of a "postal nexus" as an essential element, the counterfeit bills were properly admitted in evidence, consecutive sentences were correctly imposed under 18 U.S.C. §§ 2114, 641 and 111, and that the evidence supports the convictions, we affirm.

* Honorable C. Clyde Atkins, U.S. District Court Judge for the Southern District of Florida, sitting by designation.

THE FACTS

The facts are not substantially in dispute.

On July 22, 1981, Special Agent K. David Holmes, posed as someone interested in buying counterfeit money with genuine currency. Accompanied by a confidential informant named Jorge Castro, Agent Holmes went to Douglas Park in Miami, Florida, to meet the individuals with whom he would conduct negotiations for the purchase of counterfeit money (T 13). Informant Castro introduced Agent Holmes to Ernesto Dominguez and Appellant Francisco Garcia (T 14) as the purchaser of the counterfeit money (T 15). Dominguez asked Holmes whether he had brought the genuine currency. Agent Holmes responded affirmatively (T 15). When Agent Holmes asked Dominguez if they had the counterfeit, Dominguez responded that the counterfeit was in the trunk of the white Trans-Am in which the defendants had arrived at Douglas Park (T 15–16). The Trans-Am was parked a few spaces away

from where Agent Holmes had parked his government vehicle.

Dominguez walked over to the Trans-Am, followed shortly thereafter by Agent Holmes (T 16). Appellant Jose Garcia was seated in the driver's seat of the Trans-Am (T 17). When Agent Holmes told Appellant Jose Garcia that he wanted to do the deal, Jose Garcia stated he was not going to count phony bills there because the "place" (Douglas Park) was "sort of heated up" (T 18). The defendants wanted to see the genuine currency before displaying the counterfeit (T 18). At that point, Agent Holmes flashed the $1,500 of government money to Dominguez, while Jose Garcia remained seated in the Trans-Am and Francisco Garcia remained standing near Agent Holmes' vehicle (T 19).

Agent Holmes returned to his vehicle, followed by Dominguez. Agent Holmes once again stated that he wanted to do the deal there, but Dominguez reiterated that the place was "heated up" and said they could do the deal in another location (T 720–21). Dominguez and Francisco Garcia returned to the Trans-Am; as the vehicle drove past, they yelled that they were going to Bryant Park (T 21).

When Agent Holmes arrived at Bryant Park, Francisco Garcia and Dominguez were standing outside the Trans-Am. Jose Garcia was seated inside the vehicle (T 37). Dominguez wanted to see the genuine currency again, but Agent Holmes refused (T 41), commenting that he did not think they had any counterfeit; he asked them to show him a sample. Francisco Garcia then gave Agent Holmes a counterfeit $50 bill to examine. Dominguez assured Agent Holmes they had $65,000 in counterfeit currency to sell. Agent Holmes once again asked to see the counterfeit and began walking to his vehicle (T 42–43).

After Agent Holmes had walked about two paces towards his vehicle, Jose Garcia jumped out of the Trans-Am holding a semi-automatic pistol. Jose Garcia pointed the pistol at Agent Holmes, chambered a round into the pistol, assumed a combat stance, gripping the pistol with both hands with his finger in the trigger, pointed the loaded, chambered pistol at Agent Holmes and screamed: "Enough of this bullshit, give me the money" (T 43). Agent Holmes raised his arms in the pre-determined distress signal and began inching his way towards his vehicle, telling Jose Garcia that he was going to get the money (T 44).

Surveillance Agent Null observed Agent Holmes with his hands in the air, the prearranged distress signal which the undercover agent was to give if his life was in danger (T 88–89). While Agents Null and Grant were racing to the scene, Agent Null observed Jose Garcia pointing the pistol at Agent Holmes (T 90). Surveillance Agent Grant also saw Jose Garcia pointing the gun at Agent Holmes (T 97).

Within seconds, Agents Null and Grant arrived and shouted at Jose Garcia to drop the gun. At that point, Jose Garcia dropped the weapon (T 44). Agent Grant recovered the weapon from the ground and disarmed it, determining that one round had been chambered into the pistol (T 99). It was registered to Francisco Garcia (T 125). After disarming Jose Garcia and putting him under arrest, Agent Null conducted a pat-down of defendant Jose Garcia and seized a $100 counterfeit bill, which he immediately turned over to Agent Foley (T 91, 124).

Agent Hackenberry was also on surveillance at Bryant Park that day. Upon see-

ing Agent Holmes raise his hands in the distress signal, he also raced to the scene and observed Francisco Garcia running towards the government vehicle (T 110). Francisco Garcia leaned into the government vehicle through the opened door on the driver's side (T 110), exited the vehicle and, looking back over his shoulder, ran towards Agent Hackenberry's vehicle, carrying the black leather pouch (T 111). As Francisco Garcia ran away from the scene, the vehicle Agent Hackenberry was driving and Francisco Garcia collided, resulting in the black pouch dropping out of Francisco Garcia's hand (T 113). After Jose Garcia had been disarmed, Agent Holmes observed that the car door of the government vehicle was open; laying next to the vehicle on the ground was the black pouch containing the "flash roll" of government money (T 46).

Agent Grant's pat-down of Francisco Garcia uncovered the trunk key to the Trans-Am and a $50 counterfeit note, which note was turned over to Agent Foley (T 102, 118). Agent Grant subsequently drove the Trans-Am to the Secret Service Miami Field Office where a search of the trunk of the vehicle revealed no counterfeit currency (T 103–04).

The Defense Testimony

Both appellants testified in their own defense, essentially disputing the government witnesses' testimony as to what had happened and claiming that they had been beaten by the agents. Jose Garcia testified that the confidential Informant Jorge Castro had proposed that they show a few counterfeit bills to a potential purchaser and steal the genuine currency which the man would bring as payment for the counterfeit (T 138, 140–41). Jose Garcia had agreed, and Informant Jorge Castro had given him a $100 counterfeit bill and had given Francisco Garcia a $50 counterfeit bill (T 142). According to Jose Garcia, the plan was simply to take the money. He denied that a pistol was used (T 143). Jose Garcia testified that on July 22, 1981, they had met the agent at Douglas Park and had later moved to Bryant Park (T 145) where there had been an argument about who would show his money first (T 148).

Jose Garcia said that he had never had a gun at the scene. (T 157). Instead, he claimed that Agent Holmes, using the agent's own weapon, had pistol-whipped Jose Garcia on the head (T 148–51). He also testified that Agent Holmes had beaten Ernesto Dominguez to force Dominguez to reveal the location of the counterfeit money (T 148).

Francisco Garcia related essentially the same story as his brother (T 183–200). He testified that Informant Jorge Castro had given him the $50 counterfeit bill (T 180–81) Francisco Garcia said that Ernesto Dominguez had displayed to Agent Holmes the $50 counterfeit and had returned it to Francisco Garcia (T 192). He further testified that the weapon which was introduced into evidence had been in the glove compartment of the Trans-Am (T 182). Although he agreed that a car had hit him, Francisco Garcia denied that he had ever possessed the pouch containing the U.S. Government money (T 193). He also testified that his brother never had a gun (T 194).

The defense also called Marta Pedrosa, who testified that on July 22, 1981, while standing outside her home, she had seen two cars speeding to the park and stopping near a white Trans-Am (T 228–30). According to Pedrosa, she ran to the park and saw the agents jumping three men and kicking them (T 233). She identified Jose Garcia and Francisco Garcia as two of the men who had been arrested and kicked (T 234). She said she had seen Francisco Garcia fall after being hit by the automobile, but stated that she had not noticed any black pouch in his hand or on the ground (T 238). She identified Agent Foley as having twisted Jose Garcia's arm, demanding to know where the money was (T 239). When the agent had found the key to the Trans-Am, he had gone into the vehicle and had come out holding an automatic pistol (T 241–42). She thought the gun had been removed from the glove compartment.

Rebuttal by the Government

On July 22, 1981, Edna Benson was in her house, which faces the park. She had noticed the people and heard screaming (T 262). She had gone to the park and saw men being arrested one of whom was struggling to avoid being handcuffed (T 263). The officers were trying to quiet him (T 264). The other young men being handcuffed were quiet. Benson saw no one hit, beat or strike those being arrested (T 265).

Surrebuttal by Defendants

After the government's rebuttal, the court permitted the defense to reopen its case (T 292–337). The defense called Rafael Pedrosa, father of Maria Pedrosa, as an eyewitness to the events of July 22, 1981.

Pedrosa testified that he saw cars speeding to Bryant Park and walked down to the park to see what had happened (T 341). He saw three young men handcuffed (T 342). One of the agents found a key to the Trans-Am, searched the car, came out of the vehicle with a pistol, removed the clip and placed it in his belt (T 343–45). Pedrosa stated that he did not see anything that had happened in the park before his arrival and that when he arrived at the park the three men were already handcuffed and one was on the ground hurt (T 358). In addition, he could not tell whether the officer who searched the Trans-Am and exited with a pistol had anything in his hands when he entered the Trans-Am (T 364). He did not see the officers strike any of the men arrested (T 365).

Sur-surrebuttal by the Government

The government then called Alex Suarez who had also been present in the park on July 22, 1981, when the appellants were arrested. He observed the agent raise his hands, back away and say, "Don't shoot!", although he never saw the gun (T 379, 387). He saw the other agents arrive on the scene and arrest the three men. He did not observe any mistreatment of the three men (T 381). He, too, observed the car being searched. He said the agent who searched the car had a weapon in his waistband before he entered the Trans-Am (T 382).

No Postal Nexus Required

[1] The threshold issue is whether 18 U.S.C. § 2114 requires a "postal nexus" as an essential element. Section 2114 provides, *inter alia* that "[W]hoever assaults any person having lawful charge, control or custody of any mail matter or of any money or other property of the United States, ... or robs any such person of mail matter, or any money or other property of the United States" shall be imprisoned.

Appellants contend that section 2114 limits the conduct punishable under its provisions to actions against the Postal Service's property or employees. We do not accept the interpretation urged by appellants. To construe section 2114 as requiring proof of a "postal nexus" defies the section's unambiguous wording that it encompasses the robbery of "mail matter, *or* any money or

other property of the United States." (emphasis added)

[2] The specific use of the disjunctive "or" after the comma demonstrates that Congress intended section 2114 to apply not only to robbery of "mail matter" but to money or other property held by an authorized person. The use of a disjunctive in a statute indicates that alternatives were intended. *United States v. Scrimgeour*, 636 F.2d 1019, 1024 (5th Cir.1981) (Unit B).

If Congress had wanted to limit the offenses prohibited by section 2114 to robbery of mail matter or an assault upon a person holding money or other property in the custody of the United States Post Office, it surely knew how to do so. Congress has repeatedly enacted laws limited to offenses with respect to "mail," "letters" or "packets." *See* Judge Mansfield's dissent in *United States v. Reid*, 517 F.2d 953, 967 (2d Cir.1975).

[3] Nor can the appellants resort to the legislative history of section 2114 for support. Review of legislative history is only justified when a statute is inescapably ambiguous. *United States v. Oregon*, 366 U.S. 643, 648, 81 S.Ct. 1278, 1281, 6 L.Ed. 575 (1961); *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 395–96, 71 S.Ct. 745, 751, 95 L.Ed. 1035 (1951). *See also Malat v. Riddell*, 383 U.S. 569, 86 S.Ct. 1030, 16 L.Ed.2d 102 (1966); *Commissioner of Internal Revenue v. Brown*, 380 U.S. 563, 571–72, 85 S.Ct. 1162, 1166, 14 L.Ed.2d 75 (1965).

Assuming arguendo that Section 2114 is ambiguous, the legislative history demonstrates the Congress understood Section 2114 to encompass more than mail matter. *United States v. Reid, supra.* As Judge Friendly concluded in his dissent:

> "... the official reports of both the House and the Senate Committees with respect to the bill disclose that, although the bill was introduced at the request of the Portmaster General and hence referred to the Committee on Post Offices and Post Roads of each House, both Committees understood its purpose to be 'to bring within the provisions of the Penal Code the crime of robbing or attempting to rob custodians of Government moneys.' H.R.Rep. No. 582, 74th Cong., 1st Sess. (1935); Sen.Rep. No. 1440, 74th Cong., 1st Sess. (1935).

Reid, supra, at 970.

In addition, a plain language interpretation of section 2114 produces consistency among federal statutes imposing criminal punishment for robbery of a government employee. If section 2114 is interpreted as limited to postal property, the violent attempted robbery of a person in custody of such property would carry a mandatory 25-year sentence, but by contrast, the successful robbery of a person in custody of other government money or property would be punishable by a maximum of 15 years imprisonment under section 2112 or by a maximum of 10 years as an assault under section 111 (if a deadly or dangerous weapon were used). If section 2114 is read according to its plain and unequivocal language, consistency in federal statutes relating to the offense of violent robbery of a government employee is achieved. Thus, under this construction, a violent robbery of a custodian of any government property (whether it be mail matter or other property) draws the same penalty. *See, Reid, supra*, at 970.

We are not unmindful that the Second and Ninth Circuits have held that prosecution under section 2114 for stolen property requires proof of a "postal nexus" as an essential element. *See United States v. Rivera*, 521 F.2d 125 (2d Cir.1975); *United States v. Reid*, 517 F.2d 953 (2d Cir.1975); *United States v. Fernandez*, 497 F.2d 730 (9th Cir.1974). We embrace, however, the well reasoned dissent by Judge Mansfield in *Reid* and we hold that a postal nexus is not an essential element of a crime charged under section 2114.

The Counterfeit Notes Were Properly Admitted into Evidence

[4] Appellants challenge the introduction into evidence of a counterfeit $50 note and a counterfeit $100 note in support of their convictions for knowingly and willfully and with intent to defraud, possessing and concealing forged and counterfeit Federal Reserve Notes (i.e. Count IV). We hold that the evidence at trial met the requirements for authentication and identification as required by Rule 901(a) of the Federal Rules of Evidence.

[5, 6] The admission of exhibits into evidence is predicated on a showing that the physical exhibit being offered is in substantially the same condition as when the crime was committed. That determination is to be made by the trial judge, not the jury, and may not be overturned except for a clear abuse of discretion. *Brewer v. United States*, 353 F.2d 260, 262 (8th Cir.1965) *quoting Gallego v. United States*, 276 F.2d 914, 917 (9th Cir.1960). Factors to be considered in making this determination of admissibility include the nature of the article, the circumstances surrounding its preservation and custody, and the likelihood of others tampering with it. "It is generally recognized that tangible objects become admissible in evidence only when proof of their original acquisition and subsequent custody forges their connection with the accused and the criminal offense." *Gass v. United States*, 416 F.2d 767, 770 n. 8 (D.C. Cir.1969). Upon considering such factors, if the trial judge is satisfied that in reasonable probability the article has not been changed in any important respect, he may permit its introduction in evidence. *Brewer v. United States, supra.* *Brewer* further teaches that in the absence of any evidence to the contrary, the trial judge is entitled to assume that an official would not tamper with the exhibits.

> Where no evidence indicating otherwise is produced, the presumption of regularity supports the official acts of public officers, and courts presume that they have properly discharged their official duties.

Brewer v. United States, supra, 353 F.2d at 263, *quoting Gallego v. United States*, 276 F.2d 914, 917 (9th Cir.1960).

Special Agent Foley was in charge of the investigation that led to the indictment of the appellants. Agents Grant and Null also participated in the investigation. Agent Grant testified that he had found the counterfeit $50 bill while patting down Francisco Garcia (T 101–02). Agent Foley identified Government's Exhibit 6 as the counterfeit $50 bill seized from Francisco Garcia by Agent Grant, who immediately turned the note over to Agent Foley (T 118). The bill was admitted into evidence (T 119) and Agent Foley testified as an expert that the note seized from Francisco Garcia was, in fact, counterfeit (T 119–22). Agent Null testified that he had found the counterfeit $100 bill while patting down Jose Garcia (T 90–91). Agent Foley identified Government's Exhibit 7 as the counterfeit $100 bill seized from Jose Garcia by Agent Null, who immediately turned the

note over to Agent Foley (T 122). The $100 counterfeit bill was admitted into evidence (T 123) and Agent Foley testified that the $100 note was, in fact, counterfeit (T 124).

The testimony at trial shows that the government complied with Rule 901(a) of the Federal Rules of Evidence. Through the testimony of the various special agents, the government submitted evidence sufficient to support the trial judge's finding that the counterfeit notes were those possessed by the appellant at the time of their arrests.

The appellants' convictions under Count IV are affirmed.

The Sufficiency of Evidence

The Garcias challenge the sufficiency of the evidence to support the convictions. More specifically, they argue that (a) the money was neither stolen nor was the owner deprived of its use, (b) Jose Garcia did not brandish a deadly weapon, and (c) they were entrapped. This Court must consider whether, viewing the evidence in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942) a reasonable trier of fact could find that the evidence established the appellants' guilt beyond a reasonable doubt. *See United States v. Bell*, 678 F.2d 547, 549 (5th Cir.1982) (Unit B).

[7] The Garcias contend that the evidence failed to prove that the money was stolen or purloined or that the owner was deprived of its use as alleged in Count I and II. Appellants focus on the testimony of witnesses as to the black pouch containing the money. Agent Holmes testified that the black pouch was in the Government vehicle and that, after the arrest of Jose Garcia, he observed his car door open and the black pouch containing the flash roll of "government money," on the ground (T 46). Other agents corroborated this testimony and testified to their additional observations. Agent Hackenberry testified he saw Francisco Garcia leaning into the Government vehicle through the opened door on the driver's side (T 110). He further testified to observing Francisco Garcia exit the vehicle carrying the black pouch, which was dropped when Francisco Garcia and Agent Hackenberry's vehicle collided (T 111). Francisco Garcia disputed this testimony (T 193).

Jose Garcia argues that the evidence was insufficient, because defense witnesses contradicted the Government's version. Agents testified that Jose Garcia, standing in a combat-ready stance, pointed a loaded, chambered semi-automatic weapon at Agent Holmes (T 43–44, 90, 97). Government witness Alex Suarez testified that, although he did not see a gun, he observed Agent Holmes with arms raised and backing away, stating, "Don't shoot" (T 379, 387). The raised arms was a distress signal meaning life in jeopardy (T 44, 88–89, 110). The appellants contradicted this testimony. Both testified that no gun was used and that the weapon was in the glove compartment of the Trans-Am until removed by an agent (T 148, 150, 182). The defense called two witnesses, Marta Pedrosa and her father, Rafael Pedrosa, to support the appellants' allegations. Marta Pedrosa testified that an agent searched the Trans-Am and exited it with the pistol in his hands (T 241–42). After re-opening the defense case, Rafael Pedrosa was called, obviously on the assumption that he would corroborate his daughter's testimony. He did testify to seeing the agent who searched the Trans-Am holding a pistol in his hand after exiting the vehicle (T 343–45). When cross-examined, however, Mr. Pedrosa admitted that he could not tell whether the agent who searched the Trans-Am had anything in his hands when he entered the vehicle to search it (T 364). Further, when Alex Suarez testified as a government witness, he stated that the agent who searched the car had a weapon in his waistband prior to entering the Trans-Am (T 382). The evidence was sufficient to support the appellant's conviction under Counts I and II.

Finally, appellants contend the government failed to show that they possessed a predisposition to commit the offenses. Appellants contend that their testimony at trial supports a defense of entrapment and that their convictions should be reversed because, they argue, the government failed to prove predisposition.

The testimony presented by the government was sufficient to prove predisposition beyond a reasonable doubt. The evidence showed that Jose Garcia and Francisco Garcia both possessed counterfeit bills as show money. The testimony further showed that Jose Garcia refused to conclude the transaction at Douglas Park (T 18) and that the deal was moved to Bryant Park, where Jose Garcia pulled a gun on Agent Holmes (T 43), while Francisco Garcia removed the money from Holmes' vehicle (T 111). The testimony of both appellants contradicted that of the agents and covered facts which, if believed, may have shown inducement. However, that was a jury question. The evidence supports the verdicts.

The Consecutive Sentences Were Proper

Jose Garcia was sentenced to a total of forty (40) years incarceration: twenty-five (25) years as to Count III; five (5) years as to Count II; consecutive to Count III; five (5) years as to Counts I and IV, concurrent with each other and concurrent with Count II; and ten (10) years as to Count V, consecutive to Count III (R 2f).

Francisco Garcia was sentenced to a total of thirty (30) years incarceration: twenty-five (25) years as to Count III; five (5) years as to Counts I, II and IV, concurrent with each other and consecutive to Count III.

[8] Jose contends that his sentence of forty (40) years is incorrect. He asserts that the correct term is actually thirty-five (35) years based on his contention that Count V (whereby Jose was sentenced to a period of ten (10) years) should run concurrent with the sentences imposed for Counts I, II and IV and not consecutive to them. Jose bases this contention on *Schultz v. United States*, 384 F.2d 374 (5th Cir.1967). In *Schultz*, the Court said:

> absent clear language to the contrary, it is presumed that sentences imposed on more than one offense at the same time or at different times, will run concurrently.

Id. at 375 *quoting Subas v. Hudspeth*, 122 F.2d 85, 87 (10th Cir.1941). Jose's argument ignores the specific language of the Judgment and Commitment Order which indicates a contrary intent to imposing a concurrent sentence for Count V with Counts I, II and IV. Specifically, the Order states:

> As to Count V of the indictment, the defendant is hereby sentenced to ten (10) years in custody of the Attorney General ...; this sentence is *to run consecutive to Count III*. Defendant is *sentenced to a total of forty (40) years*.

(R 26, emphasis supplied). The Judgment and Commitment Order also provided for concurrent sentences where they were appropriate as shown by the following:

> As to Counts I and IV of the Indictment, ...; this sentence is to run concurrently with each other and concurrently with Count II.

(R 26).

It is clear that if the district court had intended for Count V to run concurrently with Counts I, II and IV, it would have included the sentence for Count V in the aforementioned provision and would not have sentenced the appellant to a *total* of forty (40) years incarceration. Accordingly, the Judgment and Commitment Order is correct on its face.

[9] The Garcias urge that the consecutive sentence imposed under Counts II, III and V violated their rights against double jeopardy under the Fifth Amendment of the United States Constitution. The guarantee embodied in the Double Jeopardy Clause "has been said to consist of three separate constitutional protections. It protects against a second prosecution for *the same offense* after acquittal. It protects against a second prosecution for *the same offense* after conviction. And it protects against multiple punishments for *the same offense*." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969) (emphasis supplied). In determining whether the crimes charged are "the same offense", the inquiry is not whether identical facts support such charges; rather the test to be applied is whether each provision requires proof of a fact which the other does not. *Albernaz v. United States*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981); *Blockburger v. United States*, 284 U.S. 299, 305, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932); *United States v. Lott*, 681 F.2d 1371, 1372 (11th Cir.1982).

[10] In the case at bar, section 2114 required proof of the fact that Agent Holmes' "life was put in jeopardy" and also proof of facts showing a "robbery." By contrast, section 111 does not require proof of facts supporting robbery or that Holmes' life was placed in jeopardy. Rather, section 111 requires proof of interference with Holmes while he was "engaged in the performance of his official duties." Thus, the *Blockburger* test is satisfied despite a substantial overlap in the proof adduced to establish the subject crimes. *See Iannelli v. United States*, 420 U.S. 770, at 785 n. 17, 95 S.Ct. 1284, at 1293 n. 17, 43 L.Ed.2d 616 (1975).

Consecutive sentences for convictions under 18 U.S.C. section 111 and section 2112 have been upheld. *United States v. Mathis*, 579 F.2d 415, 418–19 (7th Cir.1978); *United States v. Roundtree*, 527 F.2d 16, 20 (8th Cir.1975). In *Roundtree*, the defendant was charged with robbing a federal law enforcement officer of government money and assaulting the officer. The *Roundtree* Court stated: "The two offenses are separate and distinct, both of which require proof of facts that the other does not." *Id.* at 20. By analogy, convictions under section 111 and section 2114 are also separate and distinct, warranting consecutive sentences.

Under section 2114, the government must also prove that there was a "taking and carrying away by use of *force*." On the other hand, § 641 (the Count II charge) does not require the wrongful taking be accompanied by force. Clearly, section

2114 requires additional proof of facts not required by section 111 or section 641.

It follows from the above analysis, that separate charges with separate penalty provisions in distinct subchapters of the act are what confronted the trial Court.

[11, 12] Provided that the Court does not exceed the legislative authorization by imposing multiple punishment for the same offense, following a single trial, the Constitutional guarantee against double jeopardy is not violated. *Missouri v. Hunter*, — U.S. —, 103 S.Ct. 673, 678, 74 L.Ed.2d 535 (1983). A legislature can specifically authorize cumulative punishment under two statutes which proscribe the "same" conduct. *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Accordingly, the trial court may impose cumulative punishment under such statutes at a single trial. *Missouri v. Hunter, supra*. In addition, although the legislative history is silent on the question of whether consecutive sentences can be imposed for violations of sections 2114 and 111, it can "be assumed ... Congress was aware of the *Blockburger* rule and legislated with it in mind." *Albernaz v. United States, supra*, 101 S.Ct. at 1143–44.

[13, 14] Jose also contends that the elements necessary to prove the violations charged in Counts II and V are the same as those in Count III, and are therefore "lesser included offenses" of Count III, requiring merger for the purpose of sentencing. When some, but not all, of the elements of the crime charged would support a conviction of another offense, the latter may be termed a "lesser offense." *Berra v. United States*, 351 U.S. 131, 134, 76 S.Ct. 685, 687, 100 L.Ed. 1013 (1956); *United States v. Crutchfield*, 547 F.2d 496, 500 (9th Cir. 1977). The lesser offense must not require some additional element not needed to constitute the greater offense. *Olais-Castro v. United States*, 416 F.2d 1155, 1157 (9th Cir.1969).

[15] Count V (section 111 violation) requires proof of "forcibly assaulting, resisting, opposing, impeding and interfering" with a Secret Service agent. Count III (section 2114 violation) requires proof of "putting the life of an agent in jeopardy." This element would not necessarily support a conviction for the above provision of Count V. Thus, proof that an agent's life is put in jeopardy" does not *ipso facto* prove that the defendant "forcibly assaulted, resisted, opposed, impeded and interfered" with the agent's official duties. Likewise, if the government established the element of robbery as required in section 2114 (Count III), this does not necessarily prove the element of "forcibly assaulting, resisting, opposing, impeding and interfering" with an agent in the performance of his official duties as Count V would require. Accordingly, Count V is not a lesser included offense of Count III and therefore consecutive sentences are permissible.

Appellants argue that "stealing and purloining money of the United States," in violation of section 641, is a lesser included offense of section 2114 because "the elements of section 641 must necessarily be proven to convict a defendant of section 2114." They were convicted under Count III for "knowingly and wilfully robbing $1,800 in money belonging to the United States from Secret Service Agent Holmes" and in that robbery, putting the life of Agent Holmes in jeopardy by use of a dangerous weapon. On this basis, they urge that the offenses under Counts II and

III require a merger for the purpose of sentencing.

The element of force, which is necessary to prove robbery, *Brown v. State of Alabama*, 619 F.2d 376 (5th Cir.1980), is not part of the offense of "stealing and purloining." The element of stealth is usually attributed to the latter, the antithesis of force or violence. *Crabb v. Zerbst*, 99 F.2d 562, 564 (5th Cir.1938). In *Crabb*, the court held that the statutory offense of "feloniously taking and carrying away" personalty belonging to the United States (robbery), is not identical with the offense of "stealing" property of the United States and "... the penalty provisions of the one (are not) ... affected by the other." *Id.* at 565.

The facts of this case support the position that section 2114 and section 641 are not greater and lesser offenses. *See Crabb v. Zerbst, Id.*

The convictions are AFFIRMED as to all Counts.**

** However, although Francisco was not convicted of the Count V (assault) violation, and Jose was convicted of all counts, the Judgment and Conviction read identically as to both defendants. This cause is REMANDED for entry of a corrected Judgment and Commitment for Francisco.

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